IN THE

Supreme Court of the United States

October Term, 1976.

76-770

WILLIAM CAHN,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

JOHN M. ARMENTANO
Counsel for Petitioner
374 Hillside Avenue
Williston Park, N. Y. 11596
(516) 741-1111

FARRELL, FRITZ, CAEMMERER
& CLEARY, P. C.

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Opinions Below.

In the United States Court of Appeals for the Second Circuit an opinion was rendered by the Court as part of its mandate. It is unreported and is attached hereto as Appendix A.

Jurisdiction.

1. The order of the United States Court of Appeals for the Second Circuit which is sought to be reviewed by this Court was made and entered in the Office of the Clerk of that Court on November 8, 1976.

2. No application has been made respecting a rehearing, and no extension of time within which to petition for certiorari has been granted.

3. Jurisdiction of the United States Supreme Court to review the order of the United States Court of Appeals for the Second Circuit is conferred by 28 U.S.C. Section 1254.

Questions Presented.

1. Whether petitioner's due process and double jeopardy rights have been violated by the return by the same grand jury and trial upon a superseding indictment which added thirty-five new counts to the original indictment after the trial on the original indictment ended in a hung jury.

2. Whether a conviction may lie under 18 U.S.C. Section 1001 in a situation involving statements to a non-governmental body funded in whole or in part by the federal government.

3. Whether a conviction may lie under 18 U.S.C. Session 1001 in a situation involving funding by the Law Enforcement Assistance Administration under 42 U.S.C. Section 3701, *et seq., i.e.,* whether 42 U.S.C. Section 3701, *et seq.* (Esp. Sec. 3792), pre-empts 18 U.S.C. Section 1001.

4. Whether the billing of two entities for the same travel expenses which each was obligated to pay violates any federal law, rule or regulation.

5. Whether 18 U.S.C. 1001 requires proof beyond a reasonable doubt that the alleged false statement must be *material* to the representation.

6. Whether the introduction of the evidence of "similar acts" was so prejudicial under the circumstances of this case that petitioner did not receive a fair trial.

Constitutional and Statutory Provisions Involved.

AMENDMENT [V].

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

18 U.S.C. §1001.

Section 1001. Statement or entries generally.—Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. §1341.

Section 1341. Frauds and swindles.—Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated

or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

42 U.S.C. §§ 3791, 3792.

§3791. Embezzlement, theft and fraud.

Whoever embezzles, willfully misapplies, steals or obtains by fraud or endeavors to embezzle, willfully misapply, steal or obtain by fraud any funds, assets, or property which are the subject of a grant or contract or other form of assistance pursuant to this title, whether received directly or indirectly from the Administration, or whoever receives, conceals, or retains such funds, assets, or property with intent to convert such funds, assets, or property to his use or gain, knowing such funds, assets, or property have been embezzled, willfully misapplied, stolen, or obtained by fraud, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

§3792. Fradulent and false statements or entries.

Whoever knowingly and willfully falsifies, conceals, or covers up by trick, scheme, or device, any material fact in any application for assistance submitted pursuant to this title or in any records required to be maintained pursuant to this title shall be subject to prosecution under the provisions of section 1001 of title 18, United States Code [18 USCS §1001].

Facts Developed at Trial No. 2.

William Cahn, the defendant, had been associated with the District Attorney's office of Nassau County for 25 years (728). Of those years he spent 12 years as the District Attorney (731).* He operated his office on a "need to know" basis (1438) and enjoyed quite a reputation as a crime fighter, particularly against organized crime (732-733). He also did much of the investigating of major matters himself and was more an investigative D.A. than an administrative D.A. (733). Briefly stated, Mr. Cahn was active on a national scale and even on an international scale in connection with crime fighting and in connection with education of District Attorneys for improved law enforcement in this nation (734-737).

He testified that one day while in his office, he received a telephone call from an unidentified person who offered to be an informer for him (750). At this person's request, he met him at the Roosevelt Field Shopping Center in Nassau County (750). Cahn traveled to that meeting alone (751), but was kept under surveillance by Chief Spahr, a Police liaison officer who held the rank of Assistant Chief Inspector in Nassau County (636-638). Spahr testified that he followed Cahn to the rendezvous and observed the following:

> "A. You [Mr. Cahn] parked your car, stood alongside it for a while. A few moments later you were approached by a man. You had a conversation with this individual for about, I would say, fifteen minutes or a half hour. He left. You drove away. I left my car which was parked a considerable distance from where you were, followed this man on foot. He entered the shopping center and that was the last I saw of him at that time.

*Unless otherwise indicated, numbers in parentheses refer to pages in the Appendix filed with the Second Circuit.

Q. Could you describe Sam Houston, please? A. Yes, sir. He was male, white, about fifty years old. He was 5-8 or 5-9, medium build, dark hair." (639).

At the first meeting with the informer, Mr. Cahn testified that the following took place:

"He [the informer] told me [Cahn] he had a relative who was an informant for some law enforcement agency. He didn't tell me the relative and wouldn't tell me the law enforcement agency, but he said as a result of a leak his relative was killed. He was mad. He thought there was negligence. He thought it might have been deliberate.

He was coming to me to cooperate with me and he would give me information. He wasn't that much interested in money. He was more interested in the revenge. I told him that I wasn't going to buy a pig in a poke.

I asked him to give me information which would indicate to me some reliability on his part. He did. I just don't remember exactly what it was at that particular time.

He stipulated certain conditions. One, that I would never try to determine his true identity; two, that he would absolutely sign no receipt for any money given to him, and that he would tolerate—he didn't use the word tolerate, I am paraphrasing now—he did not want me to submit any vouchers or claims or anything else—and he was quite knowledgeable in that particular area—to anybody which would in any way suggest a payment.

I told him: 'You are making it impossible for me to pay you.'

He said: 'That is your problem.'

And I said, 'Look, we don't put names of informants—' and there was some discussion about that and he told me what I could do with the claim whether his name was on it or not. 'If you want me, I'm willing to go,' he said, 'but these are my conditions.'

The conversation lasted about a half hour and I told him he would have to get in touch with me thereafter.

Another one of the conditions was he would no longer meet me in the metropolitan area. I don't know, I don't remember at this moment, Mr. Bogin [the attorney examining Cahn on his direct case], whether he said the State of New York or not. However, he told me because of his position he had been in a position to meet me anywhere that I said almost at any given time. This was quite unusual. I had never heard of it before. And I said that he would have to let me know—Where can I get in touch with you, that question.

Q. Don't call me, I will call you? A. That was it. And I left." (751-753).

In order to solve the problem of paying the informer (hereinafter referred to as Sam Houston, the code name employed) according to his terms, Mr. Cahn communicated with the then County Comptroller, Angelo D. Roncallo (756). Roncallo did not remember the conversation to the same extent as Cahn (612 *et seq.*) who testified:

"He [Roncallo] told me he knew of no way of paying an informant without submitting a county voucher. Then I suggested to him that if I traveled on behalf of the County and traveled on behalf of the National District Attorneys' Association and received my expenses from the National District Attorneys' Association and used the money to pay the informant without submitting a voucher. would he have or would he know of any legal prohibition or any kind of prohibition at all." (756-757).

Mr. Cahn then researched the legality of his approach and concluded that it was permissible (759-760).

Reduced to its barest outline, Mr. Cahn testified that he was entitled to reimbursement from various organizations for travel in connection with business of those organizations and that he also had at his disposal a "Prosecution Fund" which was basically a fund of Nassau County money which was available for immediate use, but which had to be reimbursed as expeditiously as possible. Accordingly, Mr. Cahn developed the following method of having Nassau County pay the informer without reflecting it in actual claim forms to the County of Nassau:

1. Prior to embarking upon a trip for one of the organizations in which he was involved, he would draw expense money from the Nassau County Prosecution Fund because he was also going on the trip for County purposes—usually involving an extensive investigation of possible illegal activities at the Nassau County Jail, which involved extensive travel.

2. He would then go on the trip and perform both County business as well as business for the organization involved.

3. Upon return from the trip he would request in a letter, reimbursement for his expenses from the organization involved.

4. When this claim was paid to him, he repaid the County by cashing the check and placing the money in an envelope which he kept in his closet labeled "S.H." (761 *et seq.*).

It was and is the defendant's contention that, since Nassau County had the obligation to pay for informers for a District Attorney (87, 91), since he actually billed

the organization for the trip and since the County had already loaned money to Mr. Cahn for the trip out of the Prosecution Fund, the loan from the County was Repaid. This repayment was not done directly, by paying the monies into the Comptroller's office, but it was accomplished by creating a Sam Houston fund which was used exclusively for the payment of monies to Sam Houston, a County obligation. By this method of payment Mr. Cahn was able to keep his word and integrity to the informer, and he was able to get additional information from the informer at these various meetings. The total amounts paid to Sam Houston between January 1970 and November 1974 was $19,750. (765).

At the meetings with Sam Houston, Mr. Cahn had a witness who saw him pay Houston and heard him give Mr. Cahn the information. Defendant's Exhibit L (2070-2080) is a detailed account of meetings with Houston which Mr. Cahn kept. The entries begin on January 14, 1970 and run through November 10, 1974. In addition to the log, Mr. Cahn himself executed an affidavit every time he met Houston and every time a payment was made (2044-2069). Further, affidavits of the witnesses to the meetings—either Joseph Spinnato, an Assistant District Attorney, or Charles Spahr, an Assistant Chief Inspector of the Nassau County Police Department—sworn to around the dates of the meetings were introduced (2011-2041).

Because the organizations for whose purposes (in addition to the County purposes) Mr. Cahn was traveling were funded in whole or in part by the Law Enforcement Assistance Administration (LEAA), he was indicted for filing false statements under 18 U.S.C. §1001. That is, the Government contended that, since Nassau County was already paying for the trip because of County business,

Mr. Cahn's statement to the orginization, funded in whole or in part by LEAA monies, violated 18 U.S.C. §1001 in that he stated on the claim form submitted to the organization that he was not receiving reimbursement from any other source and that no other funds were available to reimburse him (33 *et seq.*). Count No. 2 of the indictment is also a false statement charge (31a-32a). Since the mails were being used for the purpose of transmitting various claims to the organizations, he was indicted for mail fraud (18 U.S.C. §1341).

In addition to the mail fraud and the false statement counts, the government included as count 46, the last count of the indictment, a charge that defendant obtained money by false pretenses by charging the NDAA $100 for hotel expenses that were provided for the defendant free of charge. This count is very crucial to the case, because the government did not include it in the original indictment, but it did include it in the superseding indictment. By virtue of its inclusion the government brought into evidence what it considered to be prior similar acts, which will be discussed below. With respect to this $100, Patrick Healy, the Executive Director of the National District Attorneys' Association, testified:

> "Q. Now, in this conversation in Washington with me [defendant], with reference to the complementary suite in Las Vegas, didn't you tell me that it was the policy of the Association [National District Attorneys' Association] to pay for the hotel lodging whether or not you slept on a park bench. A. You are entitled to it per diem, yes" (168-169).

It is essential to note that no proof was presented by the Government that defendant himself received any of these monies. Nor did the Government attempt to disprove the existence of the informer. In this regard, the

Government's contention, without any proof at all, was that Sam Houston might have been a collector of gambling debts. At no time was any gambling debt of Mr. Cahn demonstrated to have existed.

Further, nowhere is it claimed, nor is there any evidence, that defendant received expenses for trips that he did not take, or for services that he did not perform. The testimony is to the contrary in that defendant did, basically, what was expected of him. Nor is there any claim that Mr. Cahn received more than one payment for the same trip from the same entity—either the organization or Nassau County.

The aforesaid testimony together with more, will be developed in the argumentative portion of the petition and is not included herein because defendant does not wish to burden this Court.

The defendant was convicted on all counts.

At the sentencing the Court stated, among other things:

> "Another fact that I must consider here is that a sentence after trial is somewhat tentative because there is always a possibility of reversal at a new trial before another Judge. Any sentence that I impose puts a ceiling on what any other Judge can do if there is a third trial, another conviction, with different evidence." (1976).

Argument.

1. Certiorari should be granted because this case involves a significant question concerning the interpretation of a prior decision (*Blackledge v. Perry*, 417 U. S. 21) of

this Court and also involves an apparent conflict between the Circuits in connection with the application of *Blackledge.*

In *Blackledge,* this Court held that a person who had been convicted of a misdemeanor under State Law and who pursued his right of appeal must be able to do so unfettered by the apprehension that the State will retaliate by substituting a more serious charge for the original one, thereby subjecting him to significantly increased *potential* punishment. In *Blackledge,* a prison inmate was charged with and convicted of assault as a misdemeanor. He then exercised his right to appeal which, under North Carolina law, gave him a trial *de novo.* After the filing of the appeal, but before the trial *de novo,* an indictment charging the same conduct in terms of a felony offense (assault) was returned. This Court held that the indictment and the felony charge violated defendant's due process rights because a person convicted of a misdemeanor has every right to pursue his remedies without fear or apprehension that the government will "up the ante", 417 U. S. at 28. In *Blackledge,* this court held that the mere bringing of a more serious charge in response to a defendant's invocation of a right (the right to appeal) was violative of defendant's right to due process of law, 417 U. S. at 29. It is critical that, in *Blackledge,* there was no evidence whatsoever that the prosecutor had acted in bad faith or had maliciously sought the felony indictment against Perry. 417 U. S. at 28. Further, this Court specifically underscored the fact that defendant should have been free to exercise his right to appeal without any fear or apprehension that the government would retaliate by substituting a more serious charge for the original one, 417 U. S. at 28.

Relying upon the teachings of *North Carolina v. Pearce,* 395 U. S. 711, and *Blackledge,* the Court of Appeals for the Ninth Circuit held:

> "*Pearce* and *Blackledge* therefore establish, beyond doubt, that when the prosecution has occasion to reindict the accused because the accused has exercised some procedural right, the prosecution bears a heavy burden of proving that any increase in the severity of the alleged charges was not motivated by a vindictive motive. We do not question the prosecutor's authority to bring the felony charges in the first instance * * *, nor do we question the prosecutor's discretion in choosing which charges to bring against a particular defendant * * *. But when, as here, there is a significant possibility that such discretion may have been exercised with a vindictive motive or purpose, the reason for the increase in the gravity of the charges must be made to appear." *U. S. v. Ruesga-Martinez,* 534 F. 2d 1367, 1369.

The Court in *Ruesga-Martinez* also stated:

> "The mere appearance of vindictiveness is enough to place the burden on the prosecution." 534 F. 2d at 1369.

The Court reversed the judgments of conviction and ordered that the indictment be dismissed.

In *United States v. Jamison,* 505 F. 2d 407, the Court of Appeals for the District of Columbia held that to reindict defendant for first degree murder after the first trial on a charge of second degree murder had ended in a *mistrial* denied Jamison due process of law in the absence of a showing of justification. The Court stated:

> "It would appear that the reasons for such increases, as well as the factual bases, must be made

a part of the record at the time the higher indictment is filed with the court. As to what reasons might be sufficient to justify a sentence increase, one such reason was referred to in *Blackledge,* namely, that the more serious charge could not have been brought when the lesser one was because the elements of the more serious crime were not at that time present, as where the victim of an assault had not yet died, raising the possible charge to one of homicide * * *. A second situation, one which we do not think can be sensibly distinguished from the first, is that in which the government through no fault of its own simply does not learn until after the first indictment that the assault victim has died." 505 F. 2d at 416.

The Court also stated that, because the record was barren of any reason why the first degree murder charge was brought

> "We can only conclude that the reindictment of appellants for first degree murder denied them due process and that their convictions of that charge cannot stand." 505 F. 2d 417.

In *Jamison,* too, the judgment of conviction was reversed and it was ordered that indictments be dismissed.

In *United States v. Johnson,* 537 F. 2d 1170, the Court of Appeals for the Fourth Circuit held that it violated the defendant's constitutional right to due process when he was charged with a 41 count indictment after his successful appeal which challenged a conviction, based upon a plea of guilty to one count of a four count indictment.

It is significant to note that the government in *Johnson* challenged the application of *Blackledge* and *Jamison* because in both cases the prosecutor at the time of the original indictment knew of the offense charged in the later

indictment. In *Johnson,* the United States Attorney conceded that he was aware of the possible new charges at the time of the plea to the original indictment. 537 F. 2d at 1173.

The Court disposed of the attempted distinction in *Johnson* by referring to the statements in *Blackledge* that the accused did not have to prove that he was an actual victim of retaliation. 537 F. 2d at 1173.

See also, *United States v. DeMarco,* 401 F. Supp. 505 (U.S.D.C.C.D. Cal).

In the case at Bar, the original indictment (75 CR 645) charged a total of 11 counts (eight mail fraud [18 U. S. C. 1341] one false statement [18 U. S. C. 1001], two perjury [18 U. S. C. 1623]). *The superseding indictment which was returned by the same grand jury without hearing additional evidence, but after the defendant had exercised his right to a trial which ended in a hung jury, contained a total of 46 counts* (ten false statement, thirty-six mail fraud).

In the Court of Appeals, the government sought to justify the increase in the charges by relying upon the following statement which was made by the Assistant United States Attorney at the hearing on the motion

> "The defendant testified in the grand jury that in forty-six of these instances he paid these monies to an informant by the name of Sam Houston, whose identity he did not know and whom he's not been able to locate. Rather than litigate the Sam Houston issue, and whether or not he exists, the government chose to take those seven counts or instances in which the defendant had not accounted for the monies generated by the double billing, and

> we put those in the first indictment. Defendant then claimed a trial and he said 'Oh, I made a mistake in my accounting. Some of the others didn't go to Sam Houston' and we wound up splitting four of the —litigating the Sam Houston issue. The government decided, since the Sam Houston thing came out, we might as well have the fifty-five or however many there are in the statute of limitations and let the chips fall where they may. That's the reason for the additional counts in the second indictment." (Resp.'s Br. in Ct. of App., pp. 22-3).

This "explanation" by the government, simply put, is that the addition of the 35 counts was justified since defendant raised a defense at the first trial. Implicit in this is that if the defendant did not raise the defense the counts would not have been added. Petitioner submits that this explanation by the government constitutes, on its face, a violation of the Blackledge doctrine as developed by the D. C., Fourth, and Ninth Circuits. Also the influence which the government had over this grand jury is apparent from its action in connection with the first indictment, the superseding indictment and the appearance of the entire grand jury in the courtroom at the second trial for the purposes of amending the indictment again.

In determining this appeal, the Court of Appeals for the Second Circuit stated

> "Among the reasons for our affirmance, the following may be briefly stated:
>
> This case is distinguishable from *Blackledge v. Perry*, 417 U. S. 21 (1974); *North Carolina v. Pearce*, 395 U. S. 711 (1969); and *United States v. Jamison*, 505 F. 2d 407 (D. C. Cir. 1974), in several respects, primarily in that those cases involve the possibility of penalizing a defendant for his successful assertion of his rights. Impermissible retaliation is not present here. Furthermore, the government has explained to our satisfaction why it did not originally seek an indictment on all the counts, for which Cahn was indicted the second time. All else aside, Cahn did not raise the claim before trial as required by Fed. R. Crim. P. 12(b). See *Davis v. United States*, 411 U. S. 233 (1973)."

It is submitted that the Second Circuit was in error in that the retaliation present in this case is not permissible under the precedents developed in the other Circuits and is, thus, in conflict with the holdings in those Circuits. Further, assuming that there was retaliation present, the reason for "upping the ante" should not have been acceptable to the Second Circuit in that it unabashedly penalizes the petitioner for raising a defense at the first trial. Finally, the Second Circuit is in error in connection with the timeliness of the application because the issue of due process was raised by motion *prior* to trial, petitioner did not plead to the superseding indictment and a plea was entered for him, and the motion was made in terms of the aforesaid cases after trial, when Judge Judd who presided at the trial specifically stated that it was "a rehash" of the prior motion.[1]

In sum, it is submitted that the defendant has been prejudiced by having to incur increased expenses, and inability to retain trial counsel, increased public scorn and embarrassment as well as exposure to increased penalties. Further, the inclusion of Count No. 46 in the superseding indictment was the predicate for introducing evidence of

[1] All of these reasons on the timeliness aspect of the case were raised in the reply brief before the Second Circuit, which brief, that Court determined not to accept because it had already reached its decision based upon the briefs which had been filed and upon the argument of the case.

other alleged similar acts which, as will be developed below, was highly prejudicial to the defendant. Further, the defendant actually did, in fact, receive an increased penalty on County No. 46: two years of unsupervised probation.

Because of the importance of the question presented by the above, because it involves an interpretation of *Blackledge* in a rapidly developing area of law, and because of the conflict between the circuits, the petition should be granted.

2. Certiorari should be granted because the case involves the interpretation of the extent to which a statement to a private organization funded by the federal government is governed by 18 U.S.C. §1001 and the interaction of 18 U.S.C. §1001 with 42 U.S.C. §3701.

18 U. S. C. 1001 provides:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or devise, a material fact, or makes any false, fictitious or fraudulent statement or representations or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

In *United States v. Marchisio,* 344 F. 2d 653, 666, the Second Circuit held that the four elements which constitute an offense under Section 1001 are:

1. A statement,

2. Falsity,

3. Statement was made knowingly and willfully, and

4. False statement is made in connection with a matter within the jurisdiction of any department or agency of the United States.

The superseding indictment charges (Counts 1-10) that the National District Attorneys' Association, the National Center for Prosecution Management, the National Police Task Force, the Arizona County Attorneys' Association, and the National Center for Prosecution Management reimbursed Mr. Cahn with funds which it had received from Law Enforcement Assistance Administration (LEAA).

It is significant to note that the indictment does not allege that the funds of this organization which actually paid Mr. Cahn were funds of an agency or department of the United States Government. At the trial it was developed that none of these entities which reimbursed Mr. Cahn are, in fact, agencies or departments of the United States Government, although they do receive some Federal funding (116, 131, 369, 360, 452, 527).

In *Lowe v. U. S.,* 141 F. 2d 1005, the Fifth Circuit Court of Appeals held that an employee who falsified an employer's payroll at a time that the employer was building ships for the United States Maritime Commission under a contract providing that the employer should be reimbursed for payroll payments by the United States Treasury could not be convicted for making a false statement as to "matter within the jurisdiction of a department or agency of the United States." The Court stated that the hours of work and rate of pay, as well as the control and supervision over the employee, were matters within the exclusive dominion of the private employer and that the misrepresentation as to the hours worked was made to an employee

of the private corporation under an arrangement whereby the wages which were to be paid by the corporation were to be reimbursed by the United States Treasury. The Court went on to state that insofar as the employee was concerned all aspects of his employment were exactly the same as if his employer did not have any contract whatsoever with a governmental agency, and that his employer's method of procuring payment under the contract did not change his relationship to his employee. In addition, the contract itself did not designate the payroll department as an agency of the United States, nor did it place that department under the control or supervision of any such agency. The matter was remanded to the District Court for the dismissal of the indictment.

In *Terry v. United States,* 131 F. 2d 40, Eighth Circuit Court of Appeals, in a case where an application for credit was made on Federal Housing Administration forms which contained nothing to indicate that the financial institution to which the application was addressed was an agency of the United States held:

> "We are of the opinion that on the charge and the proof in this case it would be contrary to the legislative intent to sustain this conviction. It is clear that the Housing Administration had no cognizance of the Williams Loan transaction on which the indictment rests at the time of the commission of the acts charged against defendant in respect to that transaction. Whether the Administration would or would not obtain such cognizance depended entirely upon the free will of other parties over whom defendant had no control, and it is contrary to elemental principles of the criminal law that an act which is not criminal at the time of its commission be converted into a crime at a subsequent time by the independent action of other persons." (131 F. 2d at 44).

Further, Judge Dooling held on a motion to dismiss the false statement count of the *original* indictment:

> "The more serious question is whether Count 7 is sufficient in alleging an offense under Section 1001. Reference is made to 42 U. S. C. 3701-3795, which codifies the part of the Omnibus Crime Control and Safe Streets Act of 1968 which dealt with the Law Enforcement Assistance and Criminal Justice parts of the Act. Sections 3791 and 3792 deal with embezzlement and related wrongs affecting LEAA funds (3791) and the knowing and willful falsification, concealment or covering up by trick, scheme or device of any material fact in 'any application for assistance submitted pursuant to' the chapter (3792). It will be seen that the language of Section 3792 just paraphrased is identical with the first part of the language of Section 1001 which reads
>
> 'Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, . . . shall be fined . . . or imprisoned . . . or both.'
>
> Nothing, however, in Section 3792 goes on to pick up the remaining language of Section 1001 which is the following:
>
> '. . . or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined . . . or imprisoned . . . or both.'
>
> However, the Count as drafted is drafted under this latter quoted language of Section 1001 and not under that language of Section 3792 which is present also in Section 1001. It must be concluded

from this that the count is bad if it requires underpinning from Section 3792, for if that section is relied upon at all, it would appear that the charging language of the Count must express an offense within the language of Section 3792 rather than simply within the language of Section 1001. Whatever the reason for the particular language chosen and the particular approach taken in Sections 3792 and 3792, it seems clear that the LEAA offense, if intended to be singled out, must be charged in the language of Section 3792.

Whether Count 7 can be saved as a Count directly under Section 1001 was not really argued. The Government's brief simply assumed that it was enough that the National Center for Prosecution Management was an LEAA funded organization. But an entity hardly becomes an agency or department of the United States because it is funded under such an LEAA program, and, in the light of only authority so far seen, it must be concluded that the Count is not sufficient under Section 1001 standing alone.

Nor does it appear that the facts alleged could support a Section 3792 case. That section is limited to false material used in connection with an 'application for assistance submitted pursuant to' the Law Enforcement Assistance Chapter of Title 42. A claim for reimbursement of travel expenses made to an LEAA assisted entity, or in connection with an assisted program, would not be within the statute."

In the case at bar, the non-governmental organization had a finite sum of money some of which was federal money, and the claim of the defendant for reimbursement of his expenses was transmitted to the non-governmental entity which reimbursed him with that entity's funds, the entity never obtaining permission or consent of the Federal agency to make payment, and the agency never seeing the claim. Based upon the above, it is submitted that there is a complete failure of proof by the Government that the entity is one within the jurisdiction of any

department or agency of the United States as required by 18 U. S. C. 1001 as interpreted above.

Therefore, the Government has not proven one of the essential elements of the crime charged, i.e., that the statement was made in connection with a matter within the jurisdiction of an agency or department of the United States. Moreover, the indictment itself is defective for the same reason. Accordingly, counts 1 through 10 of the superseding indictment should be dismissed.

Further, it is submitted that, since 42 U.S.C. §3792 contains the provisions for crimes involving LEAA funds, Section 1001 has been pre-empted and counts 1-10 should have been dismissed on the law.

The Second Circuit stated that it found no merit in the aforesaid argument because "Cahn knew where the money was coming from". It is submitted that the aforesaid is an erroneous interpretation of 18 U.S.C. Section 1001 in that it permits a conviction under that section of a defendant who "knew" that the money he was receiving was money from a governmental agency which had been granted to a non-governmental private agency. It is submitted that the determination in this case puts the Second Circuit at variance with *Lowe v. U. S., supra,* of the Fifth Circuit, as well as with *Terry v. U. S., supra,* of the Eighth Circuit.

Reliance by the Second Circuit upon *U. S. v. Candella* 487 F. 2d 1223, is misplaced because the statements involved in *Candella* were included in affidavits which were submitted on forms prepared by the City of New York and not by HUD. However, the affidavits involved specifically contained advice to the signers which pointedly

made them aware of the nature and purpose of the affidavit and also advised them that false statement in the affidavit would be violative of the U. S. Code (487 F. 2d 1226). The case at bar is distinguishable on this point because, as set forth in defendant's main brief, it was established at the trial that none of the entities involved were, in fact, agencies or departments of the United States even though they did receive Fedral funding and, indeed, it is uncontradicted in the record that there was no policy of the LEAA regarding reimbursement for travel expenses actually communicated to Mr. Cahn, nor was he ever directly involved with any aspect of LEAA, nor did he ever claim directly to LEAA.

In sum, it is submitted that no crime has been stated under 18 U.S.C. 1001 and the holding in this case by the Second Circuit puts it again into conflict with other Circuits.

3. Because receiving dual reimbursement for the same expense from different entities who are obligated to pay is not criminal the mail fraud counts should be dismissed.

It seems that the government contends that it is a criminal act to claim expenses from private entities while concurrently claiming those same expenses from Nassau County in connection with trips during which the defendant performed distinct services for the County and for those other entities. In other words, is it a criminal act to claim reimbursement of the same expenses which are actually incurred from two entities each of which independently is obligated to reimburse travel expenses?

Since there is no federal common law of crimes (see, *Jerome v. United States,* 318 U. S. 101), in order for conduct to be considered a crime, there must be a specific

federal statute proscribing specific conduct and imposing a punishment. *Viereck v. United States,* 318 U. S. 236.

Not only is receiving two payments from two entities for a single expense not a crime, but an individual may invoke the aid of the courts to recover payments from each. For example, where one has coverage under two insurance policies, he may recover his expenses from both companies, unless it is expressly and unambiguously stated that expenses will not be reimbursed under such circumstances. See, *Rubin v. Empire Mutual Insurance* Company, 25 N. Y. 2d 426, 306 N. Y. S. 2d 914; *Thomas v. Universal Life Insurance Co.,* 201 So. 2d 529 (3rd Cir. Ct. App. La.); *Nationwide Mutual Insurance Co. v. Schilansky,* 176 A. 2d 786 (Mun. Ct. App. D. C. 1961). The law does not prevent the double reimbursement of expenses.

Even where the expenses were not actually paid by the civil claimant, the courts have enforced obligations to pay. See *Crosson v. N. V. Stoonvart Mij "Nederland,"* 409 F. 2d 865 (2nd Cir.), in which a stevedore was held liable for counsel fees to a shipowner, despite the fact that the shipowner's insurance company defended the action at no cost to the shipowner. See also, *Spurr v. LaSalle Construction Co.,* 385 F. 2d 322 (7th Cir.). In *North Central Airlines, Inc., v. City of Aberdeen, S. D.,* 370 F. 2d 129, 134 (8th Cir.), the court held that a tenant which had agreed to pay the landlord's expenses, was not affected by the fact that the landlord had insurance to cover its expenses.

This is not a civil case in which Mr. Cahn is seeking to declare his rights to payment from the private

entities involved. Nor is this case a civil case in which those private entities are seeking return of payments made.

Accordingly, because the indictment does not charge a crime it should be dismissed.

However, if the dual reimbursement of Mr. Cahn were criminal, it is submitted that in order to properly charge a crime, additional explicit allegations are required, e. g., actual knowledge and specific intent. Such "necessary allegations cannot be left to inference." *Williams v. United States,* 265 F. 2d 214, 218 (9th Cir.).

Because this essential element is absent from the indictment (33a-39a) the thirty-six mail fraud counts should be dismissed on the face of the indictment.

Further, it is submitted that no proof was adduced at trial which would make dual reimbursement for conceded expenses illegal. (See Point IV, *infra.*)

It must be noted in connection with the above that at no time was it ever contended by the Government that the same entity was charged twice for the same expense.

In this regard, in his charge, Judge Judd said:

> "Filing duplicate claims for one expense without disclosing the facts to one or both of the persons to whom the claims are presented can in and of itself be fraudulent. *It requires no expicit guideline, by-law, regulation, statute or policy formation to make it so.* Indeed, it is more to the point to say that no guideline, by-law, regulation, statute or policy formulation explicitly authorized dual payment for a single expense.

> It follows that ignorance of the existence of a by-law or policy on the point where one existed or had been articulated would not of itself excuse one who filed dual claims for reimbursement.
>
> Nevertheless, you must bear in mind the very important third essential element of each of these counts. That essential element requires that the Government show beyond a reasonable doubt that the defendant believed that the Association in question *might* not have allowed the claim for reimbursement if it had known that a second claim for reimbursement of the same expense was being presented at the same time." (1864-1865). (Emphasis added.)

It is submitted that the foregoing excerpt from the charge is reversible error because it recognizes that dual reimbursement may not be illegal and then it seems to unconstitutionally place upon the defendant the burden of disproving the possibility of criminality. Further, to state that an act may be criminal even though it violates no statute, guidelines, by-law, or policy formulation is error. See *Jerome v. United States, supra.*

Also, to predicate a criminal act on what a defendant believed "might" have happened, rather than on what he actually knew would have happened is error. To declare a legal act felonious, only because of an accused's belief, in the absence of any prohibition, whether public or private, being in any way communicated or chargeable to the accused violates due process.

In sum, it is submitted that there is no statute or regulation that prohibits dual billing; the indictment does not charge a crime on the mail fraud counts; and the proof at the trial falls far short of proving a crime on the mail fraud counts.

Accordingly, the judgment of conviction on the mail fraud counts should have been reversed and the counts dismissed. Failure to do so presents a question of law which this court should decide.

4. The admission of testimony concerning defendant's "prior similar acts" was an abuse of discretion, unduly prejudicial and deprived petitioner of a fair trial.

In *U. S. v. Dwyer,* 539 F. 2d 924, the Second Circuit stated:

> "Rule 403 of the Federal Rules of Evidence permits a trial judge to exclude relevant evidence 'if its probative value is substantially outweighted by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.' In the balancing of probative value against unfair prejudice required by Rule 403, the trial judge has wide discretion • • • and ruling that he makes will not be disturbed unless such discretion has been clearly abused." At p. 927.

Further, the same Court held in *U. S. v. Viruet,* 539 F. 2d 295:

> "The admission of testimony concerning Viruet's participation in other transactions involving stolen goods was proper and was not unduly prejudicial • • •. There was a sufficient parallel between the acts charged in the indictment and the prior (and subsequent) acts shown by the testimony so that it had real probative value regarding appellant's willingness and intent to enter into the proven conspiracy rather than merely suggesting that the appellant was of poor character." At p. 297.

In the case at bar, it is submitted that it was reversible error to admit testimony of purportedly similar acts with respect to Mr. Cahn's alleged claim for monies from only Nassau County for expenses allegedly not actually incurred.

The entire indictment generally charges Mr. Cahn with receiving two payments for actually incurred expenses allegedly resulting in a fraud only upon a private entity, i. e., dual billing. The purported similar acts deal only with single payments by the County for expenses allegedly not incurred—the Hawaii trip, the London trip, the San Juan trip (300-309).

Judge Judd admitted such testimony on the theory that it was relevant to a part of Count 46, a count not contained in the original indictment (309, 357). On the first trial, Judge Dooling excluded the same evidence as not relevant to the charges of dual payments.

Essentially, the so-called similar acts involved trips to London, Hawaii and San Juan. The predicate for admitting testimony of these trips is that portion of Count 46 which relates to an alleged payment of $100 by NDAA to Mr. Cahn for expenses which he did not actually incur (40-a, 300-309). However, Mr. Healy of the NDAA testified that Mr. Cahn was entitled to that money as a per diem (168-169). Thus, even this basis for admitting the evidence proved lacking in foundation.

The admission of this testimony in which Mr. Cahn is depicted as allegedly falsifying expenses is highly prejudicial because of the overriding aspect of Mr. Cahn's integrity and credibility in the trial. In each instance he was forced to defend himself against accusations of dis-

honesty for which he had never been indicted. Both to introduce evidence of such acts and to defend them required voluminous testimony. Six of the Government's nineteen witnesses testified almost exclusively about these three expense payments totally outside the forty-six count indictment. Additionally, Mr. Cahn testified extensively about these payments and two other defense witnesses were brought into this County solely to give evidence about these matters.

Based upon the above decisions, the admission of this testimony was prejudicial error.

Coupling the prejudicial admission of the above evidence with the trial judge's erroneous statement in the charge:

> "And you may consider that he [Mr. Cahn] has perhaps more of a motive to slant the testimony and even to lie than any other witness in the case" (1873),

it is submitted that Mr. Cahn's credibility and integrity may have suffered a fatal blow in the eyes of the jury. Under the circumstances of this case, where credibility was made a critical issue, the admission of the similar act testimony denied defendant his right to a fair trial and the conviction should be reversed.

Conclusion.

Because the case presents grave issues concerning the interpretation of *Blackledge v. Perry, supra,* and because it presents questions concerning the scope of 18 U. S. C. §1001 and 18 U.S.C. 1341, and because it presents issues concerning the allowable discretion in connection with the admission of the similar acts evidence vis-á-vis petitioner's right to a fair trial, certiorari should be granted.

Respectfully submitted,

JOHN M. ARMENTANO,
Counsel for Petitioner,
374 Hillside Ave.,
Williston Park, N. Y. 11596
516 741-1111.

FARRELL, FRITZ, CAEMMERER & CLEARY, P. C.,
December 6, 1976.

Appendix A.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 8th day of November, one thousand nine hundred and seventy-six.

Present:

Hon. Paul R. Hays
Hon. Robert P. Anderson
Hon. William H. Timbers
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v.

WILLIAM CAHN,
Defendant-Appellant.

76-1328

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed. Among the reasons for our affirmance, the following may be briefly stated: this case is distinguishable from *Blackledge v. Perry,* 417 U. S. 21 (1974); *North Carolina v. Pearce,* 395 U. S. 711 (1969); and *United States v. Jamison,* 505 F. 2d 407 (D.C. Cir. 1974), in several respects, primarily in that those cases involved the possibility of penalizing a defendant for his successful assertion of his rights. Impermissible retaliation is not present here. Furthermore, the government has explained to our satisfaction why it did not originally seek an indictment on all the counts, for which Cahn was indicated the second time. All else aside, Cahn did not raise this claim before trial as required by Fed. R. Crim. P. 12(b). See *Davis v. United States,* 411 U. S. 233 (1973).

We find no merit in Cahn's claim regarding the false statement counts under 18 U.S.C. §1001. *United States v. Candella,* 487 F. 2d 1224 (2 Cir. 1973); *Ebeling v. United States,* 248 F. 2d 429, 433-35 (8 Cir. 1957). Cahn knew where the money was coming from. We likewise find no merit in his mail fraud or prior acts claims.

With respect to Cahn's sentencing claim, we reiterate what we said in *United States v. Fiore,* 467 F. 2d 86, 90 (2 Cir. 1972), involving an almost identical comment by the same district judge.

Having carefully considered all of appellant's claims of error, we find them to be without merit and therefore affirm the conviction.

s/ PAUL R. HAYS
s/ ROBERT P. ANDERSON
s/ WILLIAM H. TIMBERS
Circuit Judges